No. 6042

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of
JOHN WALMSLEY WILSON
On Habeas Corpus

JOHN WALMSLEY WILSON,
Appellant,

vs.

WALTER E. CARR, District Director of District 31, United States Immigration Service, at Los Angeles,
Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

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On Habeas Corpus,
Petitioner and Appellant,

vs.

WALTER E. CARR, District Director of Immigration,
Respondent and Appellee.

APPELLANT'S BRIEF

STATEMENT OF FACTS

John Walmsley Wilson, appellant is a native of England, citizen of England and of the English race, single and about forty-five years of age; he first came to United States in 1900 or 1901, a passenger on the s/s "Parisian" disembarking at Montreal, Canada and was admitted at the Port of Detroit after proper inspection by the Immigration authorities; he visited England for a period of three months in 1906 returning to United States on the s/s "Majestic" and after inspection by immigration authorities was re-admitted; he visited England again for three months in 1912 or 1913 returning to the United States on the

s/s "Cedric" and again re-admitted at Port of New York after due inspection by immigration authorities.

Appellant has since his arrival into United States in 1901 maintained a residence and domicile therein and he has resided within the State of California at all times since 1923. Appellant while residing in the State of Minnesota on September 16th, 1908, pleaded guilty to a charge of petit larceny in a Justice of the Peace Court of the County of St. Louis, State of Minnesota, and was fined in the sum of Fifty Dollars which fine was paid.

Appellant on April 5th, 1928 entered a plea of guilty to an information charging him with Grand Theft filed in the Superior Court of the State of California in and for the County of San Diego, and made application to said Court for probation; and said application was granted by said Court of May 5th, 1928. The Court in granting the application for probation made an Order suspending the imposing of sentence and as a condition of probation directed that appellant "be confined in jail for the first sixty days." Appellant while at liberty under said Order granting Probation was arrested prior to November 19th, 1928 and required to show cause why his probation should not be revoked and he be sentenced as provided by law. The Superior Court upon hearing of said Order to Show Cause refused to revoke the Order granting probation but modified the original Order by requiring that appellant "shall remain on probation on the former order herein made on the condition, however, that he serve one year in the county jail in the County of San Diego—and then to be released and report to the probation officer."

On March 28th, 1929 the said Superior Court again

modified the Order of Probation and directed that appellant "be released from the date hereof until the first of July, 1929 from the date hereof, during which time the defendant is committed to the charge and supervision of the Probation Officer of said County and of this Court." The said Court on July 2nd, 1929 again modified the Probation Order by directing that "the Order heretofore made granting to defendant probation upon condition that he remain in the County Jail for the period of one year, be modified, and that the defendant be required to remain in jail no longer, and that he be released immediately, that he report to said Probation Officer as directed."

Appellant was arrested upon warrant of Secretary of Labor on February 27th, 1929 charging him with entering the United States without inspection; that he had been sentenced subsequently to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of crime involving moral turpitude, to wit: Grand Theft committed within five years after his entry. This charge being based upon an entry after a short visit of a few hours to Tia Juana, Mexico during January, 1928. During hearing a further charge was made that appellant had been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry to United States, to wit: petit larceny committed in the United States during year 1908.

After hearing and consideration the Secretary of Labor on August 6th, 1929 issued his warrant directing the deportation of appellant upon the following grounds:

> (1) That he has been convicted of a felony or other crime or misedemeanor involving moral tur-

pitude, to-wit: petit larceny, prior to entry into the United States; and

(2) That he has been sentenced, subsequently to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: grand larceny, committed within five years after his entry."

Appellant on August 12th, 1929, filed in the United States District Court for the Southern District of California Southern Division, No. 130-J Cr., his petition for a Writ of Habeas Corpus, which Writ was duly granted and thereafter, to wit on September 21st, 1929 the Respondent, Walter E. Carr, District Director of Immigration, made answer thereto. The cause was heard on petition and answer before the Honorable E. J. Henning, Judge of said United States District Court, who after consideration thereof, made an order dismissing the Writ and remanding appellant to the custody of the proper officers of the Government for deportation. Present appeal is taken from such order.

ARGUMENT

The warrant of deportation is based upon two findings of the Secretary of Labor, to wit:

> That appellant has been convicted of a felony or other crime or misdemeanor involving moral turpitude, prior to entry into the United States, to-wit: petit larceny;
>
> That appellant subsequently to May 1, 1917, has been sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after entry, to-wit: Grand larceny.

The Learned Court below added another charge:

> "The evidence shows that the alien at the time of his last entry entered without inspection and that he was at that time a person likely to become a public charge."

Counsel will present these three grounds separately in the order they are above stated.

I.

> That appellant has been convicted of a felony or other crime or misdemeanor or involving moral turpitude, prior to entry into the United States, to wit: petit larceny.

The evidence in support of this charge consisted of a certified copy of the original judgment entered against appellant by a Justice of Peace Court in St. Louis County, State of Minnesota, on September 16th, 1908 wherein it appears that appellant pleaded guilty to a charge of petit larceny and was fined Fifty Dollars, which fine was paid. Counsel contended in Court below that the crime charged, to wit: petit larceny under the Minnesota statutes did not constitute a crime involving moral turpitude, and the further contention, which was most strongly urged, that the crime having been committed within the United States more than five years prior to last entry and that no sentence to imprisonment was imposed because thereof, was not a valid ground for appellant's deportation.

A recent case decided by this Court involving the same point, upheld appellant's contention. The facts were as follows:

> Wong Yow, Chinese merchant residing in the United States, visited China in 1909 and married his first wife Ju Shee; on December 19, 1925 he

married a second wife at Astoria or Portland though his first wife was still living in China and not divorced; in 1927 alien visited China, during which visit his second wife died; he returned to United States on April 23rd, 1928, bringing with him his first wife, and in the proceedings taken to procure her admission a few days after his return he disclosed fully the circumstances of his two marriages; on May 3, 1928 alien was arrested on warrant issued by the Secretary of Labor, and after hearing, was ordered deported upon the ground that "he has been convicted of or admitted the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: bigamy, prior to entry into the United States."

This Court in deciding said case, said:

"The facts being undisputed, the controlling question is of the construction and application of Section 19 of the Immigration Act of February 5, 1917 (Stat. 874, 889; 8 USCA Sec. 115) which in so far as pertinent is as follows":

"except as hereinafter provided, any alien, who after February 5, 1917 is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime, involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry - - - any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude;—shall, upon warrant of the Secretary of Labor; be taken into custody and deported—. The provisions of this section respecting the deportation of aliens convicted of

> a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the Court or judge thereof, sentencing such alien for such crime, shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representative of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance to this sub-chapter; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment. The provisions of this section, with the exceptions hereinabove noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States."

"But assuming without deciding, that—second marriage involved moral turpitude, we note that it was contracted, not in China, but in Oregon, and as an offense would be punishable under the laws of the latter jurisdiction. It occurred after his original entry, after his return from his first visit to China and long after he had established his residence in this country, and before his return from his second visit. He was never 'convicted' of the offense, and the order of deportation necessarily rests upon his 'admissions' of the facts constituting it.

..... and it has been repeatedly held that for certain purposes, including the running of the statute of limitations, where an alien has been domiciled in the United States for a period, and, having departed therefrom, again returns, the date of his return may be taken as the date of his 'entry' (citing cases including Weedin v. Yamada, 4 Fed (2) 445.)

While in some respect the Yamada Case, is closely analagous, the precise question here pre-

sented was not involved. And manifestly, if we assume that the return of appellant, a Chinese merchant lawfully domiciled here under treaty provisions, from a visit to his country, is in law the 'entry' of an 'alien' under the Immigration Act and then apply the act literally, results in congruous, if not absurd, will ensue. All other facts being the same, had he not made this visit, he would not have been deportable upon his own admission of the second marriage. In that case he would be subject to deportation only after a 'conviction' upon a charge of bigamy and upon the happening of that contingency he would still have two possible avenues of escapes from deportation afforded by a recommendation of the trial judge and executive pardon, whereas, under the government's construction of the act, though he committed the offense within this country, he need not be 'convicted', and he cannot invoke the protection of either judicial recommendation or executive pardon. (Weedin v. Henpel, 28 Fed (2nd) 603).

Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion,—Lau On Bow v. United States, 144 U. S. 47, 59. Plainly by the section under consideration, Congress intended to group all aliens deportable for the commission of a crime, into two classes; and the more reasonable view is that the classification was made with reference to the place where the crime was committed, whether in or out of this country. Such in plain language is the statutory characterization of the first class; the phrase being 'conviction in this country of a crime." True, when it comes to the second class, the phrase used is 'prior to entry,' but we are inclined to think that Congress prob-

ably having in mind only a single entry, used the phrase as synomyous with 'out of his country.' Unless that view be taken the language leads to confusion. For example, under the government's construction, appellant's case falls within both classes. The offense with which he is charged was committed 'in this country,' and it was also committed 'prior to entry', if for the purpose of the provision his last return be deemed an 'entry.' The commission of an offense entails radically different consequences depending on when it was committed. In case it was committed in this country, deportation is subject to a statute of limitation, is conditioned upon 'conviction' and may be defeated by either judicial recommendation or executive clemency, whereas, if committed of this country 'conviction is no requisite nor can resort be be had to judicial recommendation or pardon.

Holding as we do that appellant's case falls within the first class, we necessarily conclude that the order of deportation is against the law and accordingly the judgment of the court below is reversed.

Wong Yow v. Weedin, 33 Fed (2nd) 377.

This Court in Ex parte Keizo Shibata, 35 Fed. (2nd) 636 recognized and followed the rule declared in the above cited case. The United States Circuit Court of Appeals for the Third Circuit adopted the same reasoning in Ex rel Squillari v. Day, 35 Fed (2nd) 284, holding:

> "Perjury before the Board of Special Inquiry relative to alien's purpose in entering the United States was not the commission of a crime involving moral turpitude prior to entry within the meaning of Act of February 5, 1917—in that the statute relates only to crimes committed somewhere and sometime prior to entry."

See also Ex Rel Linklater, 36 Fed (2nd) 239 where Court held:

> "An alien permanently and lawfully residing in the United States cannot be deported, on his return from temporary visit abroad under Immigration Act of 1917, Section 19—for crime involving moral turpitude committed by him in this country; such section being intended to exclude aliens guilty of crimes not punishable within jurisdiction of the United States."

The District Judge in reaching his conclusion said:

> "The object of Section 19 was to exclude undesirables whom this government under our system of law could not punish for crimes committed outside of our territory. It was not, I think, intended to be a basis for the deportation of aliens who had committed crimes in this country for which they were punishable here—at least until such punishment had definitely branded them as undesirables. To put it otherwise, deportation was not made by Section 19 an alternative penalty in respect of every crime which an alien might admit having committed within our jurisdiction."

The Learned Court below assumed the facts in case at bar were controlled by decision of this Court in Bendel vs. Nagle, 17 Fed (2nd) 719 but counsel for appellant contend that the Court in the Bendel Case did not have before it the classification of crimes, that was made the basis of the decision in the Wong Yow Case and though alien attempted to raise the question, the Court held such question was immaterial because Bendel having been convicted of a crime involving moral turpitude and because of such conviction had been sentenced to more than one year's imprisonment within five years after his last entry the fact

that Bendel had departed from United States and returned between the time of his imprisonment and his arrest for deportation would be no bar to his deportation. The Court in Bendel vs. Nagle, supra, said:

> "It will thus be seen deportation was ordered because of the commission of a crime involving moral turpitude, in this country prior to the last entry, and the principal contention of the appellant is based upon the ground that such a conviction does not come within the provision of Section 3 of the Immigration Act, excluding aliens who have been convicted of or admit the commission of a crime involving moral turpitude, because the latter provision refers exclusively to crimes committed without the United States and before entry."
>
> " . . . . When appellant sought to return to this country after his last visit to Canada he was confronted with the fact that he had been convicted of a crime involving moral turpitude. This conviction was ample ground for his exclusion and the fact that the crime was committed and the conviction had in this country was not material."

The Learned Court below attempted to escape the reasoning and conclusions of the Wong Yow Case by stating:

> "Neither do I see any applicability of Wong Yow vs. Weedin to the case at bar. The petitioner before me was *convicted* of the crime of petty larceny prior to his entry. Wong Yow had not been convicted of bigamy nor had he ever been charged with that offense."

The Learned Court below failed to observe that Section 19 of the Immigration Act in reference to crimes committed "prior to entry" provides that "any

alien who was convicted, or who admits the commission, prior to entry, of a felony, etc." and counsel contends that the fact appellant was convicted is not of itself sufficient ground to place his cause outside the rule declared in Wong Yow Case. The fact that no term of imprisonment was imposed upon Appellant upon conviction for petty larceny committed in this country in 1908 and that alleged crime was committed prior to May 1, 1917, is conclusive that warrant of deportation based upon such ground is in violation of the Immigration Act and beyond the powers of the Secretary of Labor.

II.

> That appellant subsequently to May 1, 1917, has been sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after entry, to wit: Grand Larceny.

The Learned Court below labored under the erroneous assumption that

> "The second proposition raised by petioner's counsel that a petitioner by virtue of a subsequent probation after being sentenced to imprisonment for a term of one year does not come under the scope of the charge that he was sentenced for a period of one year subsequent to entry. . . . ."

The record established conclusively that petitioner had not been sentenced to imprisonment for a term of one year, or at all, because of conviction in this country of a crime involving moral turpitude and that petitioner's counsel raised no such proposition as stated by the Learned Court below on the contrary appellant's cousnel at all times maintained that no sentence had ever been imposed upon petitioner in the proceed-

The court may impose and require any or all of the above mentioned terms of imprisonment, fine and conditions and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law; for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer; **provided,** that if the probationer should violate the terms and conditions of his probation and the court should deem it just or necessary to revoke such probation, then and in that event any period of time which such probationer may have served in jail or other detention place or any fine paid, under the terms and conditions of his probation, shall be taken into consideration as a part of his punishment, and he shall have a credit therefor to be deducted from his term of confinement or from the amount of any fine imposed upon final judgment. Upon the defendant being released from the county jail under the terms of probation or sooner by order of court, and in all cases where he is not confined in the county jail at the time of granting probation, the court shall place the defendant in and under the charge of the probation officer of the court, during such suspension or period of probation; **provided,** however, that upon the payment of any fine imposed and the fulfillment of all conditions of probation, probation shall ceaseat the end of the term of probation, or sooner, in the discretion of the court. In counties and cities and counties in which there are facilities for taking finger prints, such marks of identification of each probationer must be taken and a record thereof kept and preserved.

2. At any time during the probationary period of

the person released on probation in accordance with the provisions of this section, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, rearrest any person so placed on probation under the care of a probation officer, and bring him before the court, or the court may in its discretion issue a warrant for the rearrest of any such person and may thereupon revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life. Upon such revocation and termination the court may, if the sentence has been suspended, pronounce judgment after said suspension of the setnence for any time within the longest period for which the defendant might have been sentenced, but if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence, less any credits herein provided for.

3. The court shall have power at any time during the term of probation to revoke or modify its order of suspension of imposition or execution of sentence. It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held, but no such order shall be made without written notice first given by the court or the

clerk thereof to the proper probation officer of the intention to revoke or modify its order, and in all cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions herein.

4. Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time prior to the expiration of the maximum period of punishment for the offense of which he has been convicted, dating from said discharge from probation of said termination of said period of probation, be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney authorized in writing; **provided**, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded an proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

Section 1203, Calif. Penal Code, as amended May 26, 1927.

The penalty for Grand Theft and the practice pre-

scribed relative to imposing of sentence upon conviction in a criminal cause is set forth in following section of the California Penal Code:

> "Grand Theft is punishable by imprisonment in the state prison for not less than one nor more than ten years." (Penal Code, Sec., 489.
>
> "Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is not prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court imposing such sentence shall not fix the term or duration of the period of imprisonment."
>
> Penal Code, Sec., 1168.

Appellant contends that Probation Order dated May 5th, 1928 together with the modifications thereof, do not constitute a "sentence" unde the Laws of the State of California. The government's contention that such order granting probation to appellant upon the condition that he "be confined for the first sixty days" or for any other period of time was a "sentence to imprisonment for a term of one year or more" is not only in conflict with the clear and positive language of the Probation Order suspending the imposing of sentence but also with the provisions of the Penal Code, above quoted, which expressly declare that the Superior Court has no power to "fix the term or duration of the period of imprisonment" or to change the sentence provided by law as the penalty for the offense to which appellant pleaded guilty.

The Supreme Court of Michigan had before it recently, a case arising under a similar statute, wherein it was contended that an order granting probation

upon condition the defendant pay a fine was a sentence or final disposition of the cause by the court and that such defendant upon revocation of his probation could not be sentenced because of his conviction. The Court in overruling such contention, said:

> "Defendant points to the penalty of fine or imprisonment or both for his offense and claims the court adopted the penalty of fine. He is mistaken. The sceme of probation is wholly of legislative determination, and somewhat in the nature of an evolution of suspension of sentence at common law . . . . . Under the statute the order of probation is discretionary, tentative in nature, and in no sense a final disposition, for power to sentence, in case of breach, is expressly reserved by the very law itself. An ultimate or final judgment is not reached in a criminal case, following conviction, until the court pronounces a sentence leaving nothing to be done, but enforcement. In the case at bar the order of probation was, within the letter of the law, held a sentence in abeyance, and defendant's violation of the terms and conditions imposed called for revocation of the order and exercise of the power of final judgment, ... "
>
> People vs. Fisher, 237 Mich, 504; 212 N. W. Rep. 70.

The District Court of Appeals of California in a recent case reached the same conclusion upon the same question, holding that

> "The imposition of a fine as a condition of probation is not a judgment imposing a fine within the meaning of Section 1205 of the Penal Code, and the effect of the non-payment of a fine is only the loss of the right to be admitted to probation."
>
> In re McVeity, 59 Cal. App. Dec. 219.

An applicant for probation, if dissatisfied with the

terms or conditions attached to the order granting probation, is not compelled to submit thereto.

> "Defendants have the right to withdraw application and suffer the punishment prescribed by law for the ofense of which they were guilty."
>
> In re Nachhaber 55 Cal. App. Dec. 857.

Appellant contend that under the laws of the State of California and the decisions of its Court above cited, an order granting probation to one convicted of crime, is neither a sentence, final judgment nor final disposition of the cause in the trial court and such contention is supported by the requirements of the state law and the practice thereunder wherein a defendant is granted probation he is "committed to the charge and supervision of the Probation Ofifcer . . . and of the Court." Appellant in case at bar, is now, by same order relied upon by the government to warrant his deportation, committed to the charge and supervision of the Superior Court of the State of California in and for the County of San Diego which Court is empowered to modify the conditions of his probation or terminate it, whenever in the Court's opinion the ends of justice may so require. The period of appellant's probation may be terminated prior to date fixed in the probation order either by the Court revoking the probation and imposing sentence upon appellant or an order releasing appellant from further compliance therewith. In the latter event the plea of guilty made by appellant to the information charging him with Grand Theft must be withdrawn by the Court and an order made dismissing" the accusation or information against" appellant. In other words the criminal proceeding now pending against appellant are terminated and dismissed without the entry of any judgment

or the pasisng of any sentence upon appellant because of his conviction. Counsel contends that until the revocation of the order granting probation or the termination of the period of probation the criminal cause against appellant is still pending before the Superior Court of the State of California in and for the County of San Diego and that appellant is still within its jurisdiction and supervision and that warrant of the Secretary of Labor directing his immediate deportation not only precludes said Superior Court from complying with the provision of the Laws of California for the rehabilitation of wrong-doers but would defeat the Sovereign powers of said State to impose and enforce the proper penalty for violation of its laws, should appellant fail to comply with the conditions of his probation. That Congress did not intend deportation proceedings against an alien should interfere with the States' right and jurisdiction to punish such aliens who violates its laws, is evident from the proviso in Section 19 to the effect "nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment."

Probation with its opportunity to secure, to one convicted of crime a release from all penalties and disabilities resulting from his offense vests in such wrongdoer a substantial right.

> "On reaching the latter conclusion, it (the court) might have suspended either the imposing or the execution of sentence; and in either case, on appellant's complying with the terms of his probation for the entire period thereof, the court must have set aside the verdict of guilty and dismissed the information and appellant would have been thereafter released from all penalties and disabilities resulting from the offense. A ruling

> which deprives a party of such opportunity to apply for and perchance obtain such benefits unquestionably affects his substantial rights."
>
> People vs. Jones, 87 Cal. App. 483-498.

To sustain the order of deportation in case at bar while appellant is under probation of the Superior Court of State of California would deprive the appellant of the opportunity afforded to him by the State whose laws he violated to be released from all penalties and disabilities resulting from his offense, as well as having all record of the criminal charged dismissed from file of said Superior Court.

Congress did not make the commission of any crime in this country the conviction thereof or its admission, grounds for deportation of an alien but only the **sentence** of such alien "to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude."

> "The just referred to provision (Section 19) indicate the absence of a legislative intention to authorize the deportation of an alien because of crime or punishment therefor other than that specifically mentioned."
>
> Coykindall v. Skrmetti 22 Fed (2nd) 120.

Deportation must necessarily rest upon final judicial termination of a criminal cause against an alien by a tribunal having purisdiction of the cause and the alien; whether the disposition of the cause by the court after conviction is a sentence or final judgment must be determined by the law of the state wherein such tribunal is held; when such disposition of the cause is relied upon by the government as establishing its right to deport an alien such disposition thereof together with all terms and conditions imposed

thereon by the tribunal making same, must be taken as rendered and its construction and application must be determined by the laws of the state wherein the tribunal is held.

> "Construction of the Civil Code of California is for California Courts and construction there adopted is controlling on Federal Courts."
>
> Louie Wah Yow vs. Nagle, 27 Fed (2nd) 573.

The Federal Courts, in determining the status and consequences created by state statutes providing for indeterminate sentences in criminal cases where aliens have been sentenced under such statutes, have always adopted the construction and application of those statutes as expressed by the highest tribunal wtihin the States where alien was convicted and sentenced.

> Girtie vs. Commissioner 6 Fed (2nd) 233.
> In re Morlacci 8 Fed (2nd) 663.
> Ciambelle vs. Johnson 12 Fed (2nd) 465

The government, in case at bar, relies upon the probation order made by the Superior Court of the State of California in and for the County of San Diego as ground for appellant's deportation under the second finding and counsel contends the government takes said order as the government finds it and subject to the right of the Court which made it to modify or revoke it; the government can add nothing to said order or take any of the terms or conditions therefrom; nor can it give to such probation order any other construction or application than that incident thereto in the courts where same was made. Probation order of May 5th, 1928 in clear and unequivocal language positively states that the imposing of sentence upon appellant, for the crime to which he pleaded guilty was suspended; the statute, under

which said Court is empowered to grant probation expressly provided that such order, at any time during period of probation, is subject to modification by the Court and that until the order granting probation be revoked, no sentence shall be imposed upon the appellant; this statute further provided that upon the expiration of the period of probation, or sooner termination thereof by order of the Court, the plea of guilty made by appellant to the information charging him with Grand Theft, will be set aside and the information dismissed and tht appellant "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted". Such a dismissal of the information would terminate the purisdiction of the Superior Court over appellant and the subject matter of the information and deprive said Court of power or authorities to enter any judgment, sentence or further order in said proceedings.

Counsel contend that the probation order of May 5th, 1928 together with all modifications thereof, was at all time subject to nullification by the dismissal of the information upon compliance by appellant with the terms and conditions of his probation and such probation order when in force, is in many respects similar to a sentence to imprisonment from which sentence an appeal has been taken to a higher court and such probation order can have no more validity or force as a sentence or final judgment pending the period of probation and after the dismissal of the information upon compliance with terms and conditions of probation than a sentence to imprisonment that has been reversed and set aside upon appeal. Each order or sentence has been vacated and set aside as though never entered, one by compliance with the

terms and conditions thereof and by virtue of the legislative enactment, the other by superior judicial power of the state. It must be conceded that a sentence to a term of imprisonment which had been reversed on appeal would not be a basis for deportation of an alien even though alien may have served a year in prison before appeal heard and decided and counsel submits that an order vacated by virtue of a legislative enactment can have no greater standing as basis for appellant's deportation.

Counsel further contends that Congress intended that a formal sentence be the basis of deportation; a sentence that concluded the criminal cause and left nothing further to be done in the matter but the enforcement of such sentence. This is evident from the following proviso to Section 19:

> "nor shall deportation be made or directed if the Court or Judge thereof, sentencing such alien for such crime, shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been to the representative of the state, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuant to this subchapter."

In the case at bar, if deportation proceedings be upheld, appellant will never be afforded the right to apply for judicial recommendation against his deportation because the time to make such request under the proviso above quoted will not arrive unless appellant violates the terms and conditions of his probation and brought before the Superior Court for sentence. The right created by the proviso would be of no avail for those entitled to probation; the alien to escape deportation would be required to waive all

claims to probation under the state law and take his chance of securing pudicial recommendation against deportation when sentenced. Surely Congress never intended to deprive aliens granted probation from securing the benefits of the proviso relating to judicial recommendation and a construction of an order disposing of a criminal proceedings against an alien which produces such a result.

Appellant's cause involving the crime is still pending before the Superior Court and he is still subject to having his probation revoked ad sentenced imposed upon him according to law of the State of California; to deport him out the jurisdiction of the Superior Court would be a violation of his probation and subject petitioner to arrest and having sentence of imprisonment imposed. Not only bring upon petitioner the penalty which the trial court believed should be suspended but also denies to him the opportunity which the Laws of California grants to him to make amends for his wrongs and make of himself a useful member of the state.

Counsel has been unable to find any authorities upon the question raised by the second proposition here discussed and the Government only cited one case in support of their contention, to wit: Gogoyewize vs. Flynn, 21 Fed (2nd) 590.; the alien in that case alien had been convicted and sentenced suspended and released on parole; he violated the conditions of his parole, was arrested and sentenced to more than one year in prison which term he served before deportation proceedings were brought. In other words the Court had entered a final judgment in the criminal proceedings and the alien had served the full sentenced imposed while in case at bar probation proceed-

ings are still pending and no sentence has been imposed.

Another objection to government's contention is that the order made upon plea of guilty was granting the application for probation upon condition that petitioner serve the first sixty days in jail. This is the only order made because of his conviction of a crime involving moral turpitude; the order made some six months later, to wit, November, 1928, which required petitioner to serve one year in county jail as a further condition of his probation was evidently occasioned by some violation of a condition of the probation not sufficient in the judgment of the court to warrant its revocation. To maintain government's contention it was incumbent upon Immigration authorities to establish that the last condition attached to the probation was because of some crime involving moral turpitude committed subsequent to the order originally made on May 5th, 1928 which imposed on sixty days in jail as condition of probation.

Appellant contends he has not been sentenced to imprisonment for a period of one year or more because of a crime involving moral turpitude.

III.

The Learned Court below introduced another charge in the record against appellant as ground for his deportation and attempts to amend the findings of the Secretary of Labor and the warrant of deportation by inserting therein the following:

> "While the warrant does not include the charge, the evidence shows that the alien at the time of his last entry, entered without inspection and that he was at that time a person likely to become a public charge." (Transcript, p. 24)

The warrant of arrest did charge appellant with "entering without inspection" but the Secretary of Labor, after considering all the evidence before him, found said charge unsupported by the evidence. Such finding is binding upon the Court.

Appellant was not charged as being "a person likely to become a public charge at time of last entry" in either warrants or at the hearing had in the Immigration proceedings against him and it is submitted that Learned Court in making such finding without any opportunity granted to appellant to be heard in answer thereto violates the fundamental right of everyone to have notice and a hearing upon a charge before conviction thereof as well as being contrary to rule of law held to be applicable in such cases.

> "The deportation being upon two findings, its propriety must depend upon these and these alone. Throumoulo vs. United States, 3 Fed (2nd) 803; Ex parte Turner, 10 Fed (2nd) 816; Ex parte Nagata, 11 Fed (2nd) 178."
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> Ex rel. Ioro vs. Day 34 Fed (2nd) 920

All of which is most respectfully submitted,

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